84-1419

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

ROBERT JAMES MAKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

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Petitioner Robert James Maker respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 28, 1984.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court should remand this case because, in considering whether the Double Jeopardy Clause bars the government's appeal, the Court of Appeals, contrary to Arizona v. Rumsey, ___U.S.____, 104 S.Ct. 2305, 81 L.Ed. 2d 164 (1984), decided that the government may appeal from an "acquittal" when the "acquittal" is based upon a legal error?

II. Whether, in severing counts and in dismissing the indictment, the district court correctly determined that the evidence reveals that the petitioner devised - not the single scheme with which he was charged - but two distinct mail fraud schemes?

ALL PARTIES TO THE PROCEEDING
IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Robert James Maker

Constance Bridget Sullivan

United States of America (Office of the United States Attorney for the Western District of Pennsylvania)

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OPINION BELOW

No opinion was rendered by the United States District Court for the Western District of Pennsylvania. The opinion of the United States Court of Appeals for the Third Circuit was rendered on December 28, 1984. This opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1984.

This petition for certiorari is being filed within sixty days of the judgment, and this Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, Double Jeopardy Clause 2

18 U.S.C.§§1341 and 2

28 U.S.C.§1254(1)

29 U.S.C.§201 et seq.

STATEMENT OF THE CASE

I.

Facts

This case concerns the conduct of the petitioner, Robert Maker, in the aftermath of two automobile accidents. Neither of the accidents was staged. In the first accident on March 25, 1976, Maker was a passenger in a car when it collided with another car. A year and a half later, on August 14, 1977, Maker was involved in the second accident. This time he was driving his mother's car when it collided with another car.

With respect to the first accident, Maker is alleged to have filed claims with both the Royal Globe Insurance Company and the Erie Insurance Company. In these claims, he is alleged to have made false statements concerning his work record and his inability to perform domestic chores.

With respect to the second accident, Maker is alleged to have filed a claim with State Farm Insurance Company. In this claim, he is

alleged to have made false statements concerning his work record[1].

The government alleges that, as a result of his false statements, Maker received wage-loss benefits and other income to which he had no legitimate claim.

The following table, derived from the indictment , reveals the sequence and nature of the alleged false statements:

---

[1] In each of his three claims, Maker is alleged to have said he worked at times when he did not really work. And, conversely, he is alleged to have said he could not or did not work, when in fact he could and did.

Abbreviations

S.F. (State Farm)
Erie (Erie Insurance)

1976	Accident No. 1	1976	Accident No. 2
Jan.			
Feb.			
Mar. 25	Accident #1		
Apr. 27	Apply for benefits with R.G.		
May			
June			
July 22	First bi-weekly benefits from R.G.		
Aug.			
Sept.			
Oct.			
Nov.			
Dec.			

Jan. 6	File domestic services claim with R.G.		
Feb.			
Mar.			
Apr.		20	Apply for policy with S.F.
May 18	File additional claim with R.G.		
June			
July 15	Last bi-weekly benefit payment from R.G.		
Aug. 9	Statements re: domestic services to R.G.	14	Accident No. 2
Sept. 13	Legal action v. other driver's company (Erie)		
Oct.		13	File claim with S.F.
Nov.		2	First bi-weekly benefit payment from S.F.
Dec.			

1978			
Jan. 24	Statement re: injuries to Erie		
Feb. 23	Deposed re: claim v. Erie		
Mar.			
Apr.			
May			
June 22	Sent pre-trial statement to Erie		
July			
Aug.			
Sept.			
Oct.			
Nov.			
Dec.			

Jan.			
Feb.			
Mar.			
26	Testified at trial; awarded	19	Last bi-weekly benefit payment
27	$5,000 from Erie		from S.F.
28			
Apr.		5	Letter re: continuing benefits
		8	to S.F.
May			
June			
20	Letter re: additional benefits to R.G.		
27	Draft issued for $5000 from Erie		
July			
Aug.			
Sept.			
Oct.			
Nov.			
Dec.			

1980	Accident No. 1	1980	Accident No. 2
Jan.			
Feb.			
Mar. 24	Arbitration award for $20,000 from R.G.		
Apr. 3	Payment of $20,000 from R.G.		

II.

Indictment

On the basis of these allegations, a grand jury sitting on the Western District of Pennsylvania charged Maker[2] in an eighteen-count indictment with having

> ". . .devised and intended to devise a [single] scheme and artifice to defraud. . .insurance companies. . . [i]n violation of Title 18, United States Code 1341 and 2".[3]

The single scheme is alleged to have encompassed Maker's claims against Royal Globe and Erie - arising out of the first accident - as well as his claim against State Farm - arising out of the second accident.

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[2] One Constance B. Sullivan was charged as a co-defendant.

[3] §1341 provides that:

"[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin,

(continued)

III.

Proceedings in the District Court

After the jury was selected and impanelled, after the district court passed upon certain motions of Maker's co-defendant, and after the government's opening argument, counsel for Maker moved that the charges relating to the two accidents be severed[4].

Footnote 3 (continued)

obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[4] Motions were made to sever defendants as well.

During the course of an extensive dis-
ussion between the trial judge and counsel -- the
ubject of which was the defendant's severance
otions -- the court ordered the United States
ttorney to turn over the complete set of documents
hich the government intended to introduce at trial.
ong the documents were depositions and sworn
tatements of the defendants. The trial judge read
hem and determined: "[t]here are two different
ccidents out of which these alleged false claims
ose. One. . .occurred on March 25, 1976, another
. .occurred on August 14, 1977." The judge
rther concluded there "are two different events
nd] no indication that the scheme was continuous."
nally, in ordering a severance, the court reasoned:

> "In light of what [the U.S. Attorney told] the jury that [he is] going to prove, [and] in light of [my] reading all of these several hundred pages of documents in camera. . ., [i]t's not a common design, there's no conspiracy alleged here, there's no plan here that I can see. . .where all these accidents were anticipated."

Because there were two schemes and not one, and because the Fifth Amendment right against self-incrimination precluded the co-defendants from calling each other to testify, the district court initially ordered a severance of counts and a severance of defendants. But when later presented with United States v. Camiel, 680 F.2d 31 (3d Cir. 1982), the district court concluded that severance was not the legally mandated remedy for a variance between the one scheme alleged in the indictment and the two schemes which the government's opening and exhibits revealed:

> "Well, you have to dismiss the indictment, I think. . .It seems that as a single scheme indictment here, seems that the case is bottomed on a multiple scheme, at least two schemes. It appears from the Camill [sic] case that this is a defect which cannot be cured by a severance, which I had attempted, and a separate trial. It says the indictment in Camill [sic] is out because of the prejudicial variance, and an attempt by this Court, which the Court, in fact, did make. . . to cure this problem by severance remedy or compartmentalizing this matter into . . .four trials, especially when you

> have a situation where you have a single scheme theory with multiple schemes as a matter of fact alleged, under all these circumstances this Court has no other alternative except to dismiss this indictment, and the Court dismisses this indictment as to Robert James Maker, . . .and the Court, likewise, dismisses this indictment as to Constance Bridget Sullivan, based on the case of United States versus Camill [sic]."[5]

IV.

Proceedings before the Court of Appeals

From the order dismissing the indictment, e government appealed to the Third Circuit. In s appeal, the government argued: 1) the district urt erred in dismissing the indictment, and 2) e district court abused its discretion in severing unts and defendants.

In response, Maker argued that the Double opardy Clause barred the government's appeal from e order dismissing the indictment, because the der was an "acquittal for Double Jeopardy purposes."

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ounsel for Maker had moved to have the indictment smissed; he had also moved for a judgment of quittal, but that motion was denied.

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ted States v. Martin Linen Supply Company, 430
. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642,
(1977); United States v. Scott, 437 U.S. 82,
98 S.Ct. 2187, 2194, 57 L.Ed.2d 65, 74 (1978);
zona v. Rumsey, ___U.S.___, 104 S.Ct. 2305,
0-11, 81 L.Ed.2d 164, 171-172 (1984). Maker
o argued: 1) the district court did not err in
missing the indictment, 2) because the government
not appeal from the order severing counts and
endants, the Third Circuit had no jurisdiction
consider the severance, and 3) in severing counts
defendants, the district court did not abuse
discretion.

V.

The Opinion of the Court of Appeals

In its opinion, the Court of Appeals con-
ded: 1) the government's appeal was not barred
the Double Jeopardy Clause, 2) the district court
ed in dismissing the indictment, 3) the district
rt abused its discretion in severing counts, and
the district court did not abuse its discretion
severing defendants. The Third Circuit then re-
ded the case to the district court.

ARGUMENT

I.

THE SUPREME COURT SHOULD REMAND THIS CASE BECAUSE, IN CONSIDERING WHETHER THE DOUBLE JEOPARDY CLAUSE BARS THE GOVERNMENT'S APPEAL, THE COURT OF APPEALS, CONTRARY TO ARIZONA V. RUMSEY, ____U.S.____, 104 S.CT. 2305, 81 L.ED.2d 164 (1984), DECIDED THAT THE GOVERNMENT MAY APPEAL FROM AN "ACQUITTAL" WHEN THE "ACQUITTAL" IS BASED UPON A LEGAL ERROR.

In overlooking the controlling language of Arizona v. Rumsey, _____U.S.____, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings. . .as to call for an exercise of [this] Court's power of supervision." Rule 17.1(a) of the Supreme Court Rules.

Under the Double Jeopardy Clause, it is clear that the government may not appeal from a judgment of acquittal. In Martin Linen Supply Company, supra, this Court confirms and explains this rule:

> "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that. . . '[t]he verdict of acquittal. . .

could not be reviewed without putting [the defendants] twice in jeopardy, and thereby violating the Constitution'. . .[W]e have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action . . .Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. 564, 571, 97 S.Ct. 1349, ____, 51 L. Ed.2d 642, 651 (1977) (citations omitted, emphasis added).

In United States v. Scott, supra, the Court said:

"A judgment of acquittal whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."

. . .

"To permit a second trial, after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'" 437 U.S. 82, 91, 98 S.Ct. 2187, ____, 57 L.Ed.2d 65, 74 (1978). (footnote omitted, emphasis added)

In reviewing the question of whether the ouble Jeopardy Clause bars the government's appeal this case, the Court of Appeals attempts to add new and erroneous twist to the Double Jeopardy ause: "[t]he. . .appeal. . .is barred only if the strict court's legal determination about the ements of a single [mail fraud] scheme is correct."[6] . 20a) The Court of Appeals then proceeds to find at the district court's determination about the ements of a single mail fraud scheme was incorrect. d on the basis of this finding, it rules that the ouble Jeopardy Clause did not bar the appeal.

But, in concluding that the Double Jeopardy ause does not bar an appeal from an acquittal when e acquittal is based on the district court's legal ror, the Court of Appeals overlooks the clear and ntrolling language of Arizona v. Rumsey, supra, which the Supreme Court said:

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his conclusion is repeated in the court's summary the government's argument: "The government re- onds that the district court dismissed the indict- nt as a result of an erroneous legal determination, d the double jeopardy clause is, therefore, not plicated." (p.14a) (emphasis in original)
The court also commented that ". . .this is a case which the district court as the result of a legal ror, determined that the government could not prove fact that is not necessary to support a conviction." .22a) (emphasis added)

> "Reliance on an error of law. . . does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. '[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles'. . . affects the accuracy of that determination, but it does not alter its essential character.' United States v. Scott, 437 U.S. 82, 98, 57 L.Ed.2d 65, 98 S.Ct. 2187 (1978) (quoting id., at 106, 57 L.Ed.2d 65, 98 S.Ct. 2187 (Brennan, J., dissenting)). Thus, this Court's cases hold that an acquittal on the merits bars retrial even if based on legal error." id. U.S. at ___, L.Ed.2d at 171-172.

Even if the district court applied mistaken
gal principles to the question of whether the evi-
nce and opening argument could together be con-
rued to prove a single scheme, see infra p.26,
e Double Jeopardy Clause still bars the government's
peal from the order dismissing the indictment.

The instant case bears a striking resem-
ance to the situation which arose in Mitchell v.
ng Packing Company, 350 U.S. 260, 76 S.Ct. 337,
0 L.Ed. 282 (1956), and its companion case of
einer v. Mitchell, 350 U.S. 247, 76 S.Ct. 330,
0 L.Ed. 267 (1956). In Steiner, the Supreme Court

construed Section 4 of the Fair Labor Standards Act, 29 U.S.C.§201 et seq. In Mitchell, the Supreme Court discovered that its construction of Section 4 conflicted with the Ninth Circuit construction of Section 4. Accordingly, the Supreme Court reached the following conclusion:

> "Because the decision of the court below. . .is not in accordance with our construction, the judgment must be reversed and remanded for proceedings not inconsistent herewith." Mitchell v. King Packing Company, supra, 350 U.S. at 263, 76 S.Ct. at 339.

Also see, e.g., Colombo v. New York, 405 U.S. 9, 92 S.Ct. 756, 30 L.Ed.2d 762 (1972); Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); National Labor Relations Board v. Walton Manufacturing Company, 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed.2d 829 (1962).

In Arizona v. Rumsey, supra, the Supreme Court clearly stated that the Double Jeopardy Clause bars an appeal from an "acquittal" even when the "acquittal" is based upon an error of law. In the instant case, the Court of Appeals construed the

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ble Jeopardy Clause in a contrary manner:
ording to the Third Circuit, the government may
eal from an "acquittal" when it is based on an
or of law. Because the Third Circuit standard
not in accordance with the Supreme Court ruling
Arizona v. Rumsey, the judgment of the Third
cuit must be reversed and remanded for proceedings
inconsistent with Arizona v. Rumsey.

In the alternative, because the relevant
ndard is not hard to apply, this Court need not
and the matter to the Court of Appeals. Consolo
Federal Maritime Commission, 383 U.S. 607, 621,
S.Ct. 1018, ____, 16 L.Ed.2d 131, 141 (1966).
tead, because it constitutes "a resolution,
rect or not, of some. . .of the factual elements
the offense charged", United States v. Martin
en Supply Company, supra, the order dismissing
indictment is an acquittal for Double Jeopardy
poses, and the government's appeal must be
missed.

II.

IN SEVERING COUNTS, AND IN DISMISSING THE INDICTMENT, THE DISTRICT COURT CORRECTLY DETERMINED THAT THE EVIDENCE REVEALED THAT THE PETITIONER DEVISED - NOT THE SINGLE SCHEME WITH WHICH HE WAS CHARGED - BUT TWO DISTINCT MAIL FRAUD SCHEMES.

Maker was charged with having "devised . . .a [single] scheme to defraud insurance companies." But having reviewed the indictment, the government's opening argument, and its documentary evidence, the district court found that Maker devised "at least two schemes". Accordingly, the district court ordered that counts of the indictment be severed, and later, that the indictment be dismissed.

The Court of Appeals, having concluded that ". . .the government. . .properly alleged one scheme to defraud. . ." (p.27a), decided that, in severing counts, the district court abused its discretion, and that, in dismissing the indictment, the district court erred.

A review of the government's evidence in light of the applicable law, reveals the government's

evidence does not prove that Maker devised a single mail fraud scheme. Instead, it reveals that he devised two such schemes. It reveals two "separate adventures of like character" Kotteakos v. United States, 328 U.S. 750, 769, 66 S.Ct. 1239, 1250, 90 L.Ed. 1557 (1946) and the ". . .similar purposes of the separate adventures, Kotteakos [id]." United States v. Jackson, 696 F.2d 578, 583 (8th Cir. 1982).

In United States v. Rodgers, 624 F.2d 1303 (5th Cir. 1980), cert. denied sub nom Anthony J. Bertucci Construction Company v. United States, 450 U.S. 917 (1981), the court concluded that a single scheme was proved when the evidence showed: "[1] a common goal, [2] operations carried out in a similar manner, and [3] an overlapping of participants." (emphasis added) Also see page 24a.

In addition, for a defendant to have devised a scheme to defraud, he must entertain a specific intent to defraud. United States v. Pearlstein, 576 F.2d 531 (3d Cir. 1978); United

States v. Klein, 515 F.2d 751 (1975).

Furthermore, "a mere succession of unrelated and diverse swindles, even though they possess 'a common stage' is not within the reach of the mail fraud statute. McLendon v. United States, 2 F.2d 660, 661 (6th Cir. 1924); Dyhre v. Hudspeth, 106 F.2d 286, 288 (10th Cir. 1939)." Bliss v. United States, 354 F.2d 456, 457 (8th Cir. 1966).

From Maker's claims arising out of the first accident, one can infer that he devised a scheme to defraud Royal Globe and Erie. And from his claims arising out of the second accident, one can infer that he devised a scheme to defraud State Farm. But evidence of these two separate sets of claims does not support an inference that Maker devised a single scheme to defraud insurance companies in general. There is plainly no showing of a "common goal" or a common purpose to unite these separate sets of claims. The first accident precedes the second by a year and a half. Neither

as staged and, as the district court observed, the second accident and the claims arising out of it could not have been planned in advance[7]. These facts confirm the absence of a common goal to unite the separate sets of claims.

Not only does the evidence show no common goal for the two sets of claims; it also shows that Maker lacked the specific intent "to defraud insurance companies." Admittedly, the evidence supports a finding that, in his claim arising from the first accident, Maker specifically intended to defraud Royal Globe and Erie. And concerning his claim arising out of the second accident, the evidence supports a finding that Maker specifically intended to defraud State Farm. But, from these two sets of claims, one cannot infer what the government charges, i.e. that Maker specifically intended to defraud insurance companies in general.

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[7] The Court of appeals mistakenly treats the district court's finding that "it's impossible. . .that [Maker] planned to bilk [all three insurance companies]. . . before the two accidents happened", (p.11a) as an indication that "a single scheme conviction requires proof that the defendant had planned the scheme in its major details before any aspect of scheme is implemented" (p.19a). But while no such detailed plan need be shown to prove a single scheme, the lack of such a plan, and the fact of a year and a half lapse between the two unstaged accidents makes the absence of a common purpose clear.

CONCLUSION

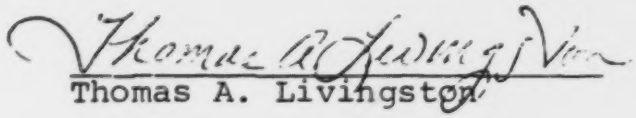
WHEREFORE, petitioner prays this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit. Specifically, petitioner prays this Court reverse the order of the Court of Appeals, and dismiss the government's appeal as having been barred by the Double Jeopardy Clause. United States v. Martin Linen Supply Company, supra, United States v. Scott, supra, and Arizona v. Rumsey, supra.

In the alternative, petitioner prays this Honorable Court remand the case to the Court of Appeals for rehearing in light of the controlling language of Arizona v. Rumsey, supra.

In the event that this Honorable Court should find that the Double Jeopardy Clause does not bar the appeal, petitioner prays that this Honorable Court, upon finding that the evidence reveals that he devised not one, but two distinct

mail fraud schemes, reverse the Court of Appeals and uphold the district court order dismissing the indictment, and/or severing counts.

Respectfully submitted,



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APPENDIX

A P P E N D I X

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 83-5806 & 83-5862

UNITED STATES OF AMERICA,

Appellant

v.

ROBERT JAMES MAKER,
a/k/a/ Robert Maker, a/k/a R. J. Mahar;
CONSTANCE BRIDGET SULLIVAN,

Appellees

On Appeal from the United States
District Court for the
Western District of Pennsylvania
(D.C. Crim. No. 82-00155)

Argued June 7, 1984

Before: WEIS, BECKER, *Circuit Judges*
and ACKERMAN, *District Judge**

(Filed December 28, 1984)

J. ALAN JOHNSON
United States Attorney
PAUL J. BRYSH (Argued)
Assistant U.S. Attorney
633 U.S.P.O. & Courthouse
Pittsburgh, PA 15219

Attorneys for Appellant

---

* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

THOMAS A. LIVINGSTON (Argued)
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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal by the government pursuant to 18 U.S.C. § 3731 (1982) from the dismissal of a mail fraud indictment presents difficult questions regarding the interpretation of the double jeopardy clause of the fifth amendment. It also requires us to consider the elements necessary for proof of a single scheme to defraud.

The indictment charged the defendants, Robert James Maker and Constance B. Sullivan, with a single scheme to defraud in connection with insurance claims arising out of two motor-vehicle accidents in which Maker was involved. *See* 18 U.S.C. § 1341 (1982). After the jury was sworn and proceedings were commenced, the district court ordered separate trials with respect to the counts arising from each scheme, and also ordered separate trials for each defendant. Subsequently, relying on *United States v. Camiel*, 689 F.2d 31 (3d Cir. 1981), the court dismissed the

indictment, holding that the evidence could not support an indictment based on only a single scheme, but rather that a separate scheme arose from each accident.

The defendants seek to uphold the district court's order of dismissal and argue preliminarily that this appeal, which seeks a reinstatement of the indictment and consequent trial thereon, is barred by the double jeopardy clause. Notwithstanding the fact that the indictment was dismissed after a jury was impanelled, we conclude that the double jeopardy clause does not bar this appeal, and that, if the government is able to prove the allegations in the indictment, such evidence would be sufficient to support a conviction based on a single scheme. We therefore reverse the judgment of the district court and remand the case for trial. We then consider whether the district court abused its discretion in ordering separate trials. Given our conclusion that the district court erred in determining that the allegations of the indictment necessarily involved two separate "schemes," we hold that the court abused its discretion in ordering separate trials on the counts arising from each accident. Finally, we conclude that the district court did not abuse its discretion in ordering separate trials for the two defendants.

Resolution of the legal issues presented in this case requires that we first describe in some detail the allegations of the indictment.

I. *THE INDICTMENT*

The defendants were named in an indictment charging eighteen counts of mail fraud in furtherance of a single scheme to defraud. According to the indictment, the scheme began when Maker was involved in a motor-vehicle accident on March 25, 1976, and continued after he was involved in a second

accident on August 14, 1977.[1] Neither of the accidents was staged; rather, Maker simply sought to turn them to his account. Generally, the indictment alleges that Maker carried out this scheme by providing three different insurance companies with false information: first, that he had been employed as a boilermaker until each accident rendered him unable to continue that work; and, second, that he did not pursue any other work during the time he was receiving wage-loss benefits from the three companies.[2] We turn to the specifics.

A. *The Royal Globe Policy Claims*

On April 27, 1976, Maker applied for benefits, including wage-loss benefits, in connection with the March 25, 1976, accident, from the Royal Globe Insurance Company.[3] Maker stated that, prior to the accident, he had been earning an average of $400 a week as a journeyman with the Boilermakers Local 154 working out of Pittsburgh. The indictment alleges, however, that Maker had actually been living in Florida for over a year before the accident and had received no income from employment out of Local 154 for that period. Maker received wage-loss benefits from Royal Globe for the period beginning on the date of his accident through July 15, 1977, at which time the

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1. The final illegal act alleged in the indictment occurred on April 3, 1980. Appendix at 15A.

2. The indictment acknowledges that Maker informed the insurance companies that he had performed work as a boilermaker for several days. *See id.* at 10A (¶ 23).

3. The Royal Globe policy was issued in the name of Maker's mother; Maker's eligibility was premised on his representation that he lived with his mother at the time of the accident. *Id.* at 6A (¶ 8). The policy was issued in accordance with the Pennsylvania No-Fault Law. *See id.* at 84A.

maximum of $25,000 had been paid under the policy. *Id.* at 7A (¶ 9). On January 6, 1977, Maker also applied for compensation for domestic services provided by Sullivan. The indictment alleges that this claim was fraudulent because Maker was able to perform ordinary domestic chores throughout this period. *See id.* (¶ 10). The indictment also alleges that on August 9, 1977, Maker and Sullivan submitted sworn statements to Royal Globe indicating that Maker had been incapacitated from April 1976 until the date of the statement and that he had paid Sullivan $140 a week for domestic services that she had performed while Maker was injured. *Id.* at 8A (¶ 14).

Finally, the indictment alleges that on June 20, 1979, Maker sought from Royal Globe an additional $22,500 as compensation for wages lost as a result of the March 25, 1976, accident. *Id.* at 11A (¶ 27). This request was submitted to a Board of Arbitrators, which, on March 24, 1980, awarded Maker $20,000 of the requested benefits. *Id.* (¶ 29). Royal Globe paid Maker the $20,000 on April 3, 1980. *Id.* (¶ 30).

B. *The Erie Insurance Company Policy Claims*

The indictment further alleges that, on September 13, 1977, Maker initiated legal action in the Court of Common Pleas for Allegheny County against Erie Insurance Company, the insurer of the driver of the car involved in the March 25, 1976, accident.[4] *Id.* at 8A (¶ 15). On several occasions, according to the indictment, Maker supported this claim with false statements to the effect that he had been physically unable to return to work after the March 26, 1977, accident,[5] that he

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4. This suit was filed one month after Maker's second accident, which occurred on August 14, 1977.

5. This statement was made in answer to interrogatories on January 13, 1978. *See id.* at 9A (¶ 18).

had resided in Pittsburgh and had been employed as a boilermaker out of Local No. 154 prior to the accident,[6] and that he had worked as a boilermaker for a total of only three days from the date of the accident until the end of March 1979.[7]

The suit against Erie concluded on March 28, 1979, when Maker was awarded $5,000. *Id.* at 10A (¶ 24). Erie then allegedly paid Maker $5,000 on June 27, 1979. *Id.* at 11A (¶ 28).

C. *The State Farm Insurance Claims*

On April 20, 1977, Maker applied for an automobile insurance policy that included coverage for lost wages of up to $2,500 a month, with a ceiling of $50,000. *Id.* at 7A (¶ 12). When he applied for this policy, which was assigned to the State Farm Insurance Company, Maker allegedly represented that he was employed as a boilermaker with Local No. 154. *Id.*[8]

The indictment alleges that Maker filed a claim with State Farm for damages resulting from his August 14, 1977, accident. This claim, filed on October 13, 1977, stated that Maker had been earning $568 plus overtime each week before the August accident, but that he had been unable to work after the accident. *See id.* at 8A (¶ 16). State Farm acted on this claim on

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6. These allegedly false statements were made during a deposition on February 23, 1978. *See id.* (¶ 20). The statements are virtually identical to those that accompanied Maker's claim for wage-loss benefits from Royal Globe. *See supra* page 4.

7. Maker allegedly made this statement at the trial against Erie on March 26 and 27, 1979. *Id.* at 10A (¶ 23).

8. This is the same allegedly fraudulent representation that Maker made to the Royal Globe and Erie Insurance Companies. *See supra* note 6 and accompanying text. The State Farm policy was issued in accordance with the Pennsylvania No-Fault Law. *See id.* at 85A.

November 2, 1977, paying Maker for wage-loss benefits retroactive to August 15, 1977. State Farm then reimbursed Maker for his alleged wage losses at a rate of $1,087.42 every two weeks until March 19, 1979. *Id.* at 8-9A (¶ 17).[9] After State Farm terminated the wage-loss payments, Maker allegedly instructed his attorney to write letters on April 5 and 18, 1979, and May 9, 1979, to State Farm asking that the benefits be continued and stating that Maker would initiate legal action in the absence of such payments. *Id.* at 10-11A (¶ 25).

D. *Employment as a Boilermaker*

The indictment alleges that there were four periods of time during which Maker was employed as a boilermaker at the same time that he was receiving wage-loss benefits from one or more insurance companies.[10] The first period was from April 1 to August 3, 1977, during which, the indictment alleges, Maker worked as a boilermaker for the Babcock and Wilcox Construction Company, using the name Robert Makar. *Id.* at 7A (¶ 11). This is a time period for which Maker allegedly requested and received wage-loss benefits from Royal Globe and for which Maker and Sullivan allegedly requested domestic-service reimbursements.[11]

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9. The total amount of wage-loss benefits paid out to Maker by State Farm over the approximately eighteen-month period was $44,946.72. *Id.* at 9A (¶ 17)

10. As is noted *infra*, Maker allegedly used a false name and social security number when he performed some of this work. The indictment alleges that he applied for a new social security number in the name of Robert James Makar on December 15, 1976. *Id.* at 6A (¶ 7).

11. It is less clear on the face of the indictment whether the $5,000 judgment against Erie was intended to compensate Maker for wage losses during this time period.

Maker was next employed during two periods for which, according to the indictment, it can be inferred that he received wage-loss benefits from two, and possibly all three, insurance companies. The indictment alleges that Maker worked for 67 1/2 hours as a boilermaker during January 1978, again using the false name of Robert Makar. *Id.* at 9A (¶ 19). It then alleges that during May and June 1978, Maker was employed as a boilermaker by Schneider, Inc., under his real name, and by both United States Steel Corp. and Bottum, Inc., under the name Robert Makar. *Id.* at 10A (¶ 22). During these two time periods, Maker allegedly received wage-loss benefits from State Farm based on the disabling injuries caused by the second accident. One could infer from the indictment that the $20,000 paid by Royal Globe to Maker as a result of the arbitration process was intended, in part, to reimburse Maker for wage losses during these time periods. Finally, one could also infer from the indictment that part of the $5,000 judgment against Erie was intended to reimburse Maker for wage losses during these two periods. *See supra* page 6.

Finally, the indictment alleges that from April 6, 1979, to August 6, 1979, Maker worked as a boilermaker for the Babcock and Wilcox Construction Company, using a false name, and for the Simakas Brothers Construction Company, using two false names. Appendix at 11A (¶ 26). As set out above, the indictment alleges that during this same time period Maker directed his attorney to request additional wage-loss benefits from State Farm based on the second accident. Also, it was during this interval that Maker allegedly submitted the claim to Royal Globe for an additional $22,500 in wage-loss benefits based on the first accident.[12]

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12. This was the claim that resulted in the $20,000 arbitration award of March 24, 1980.

As the foregoing summary indicates, Maker and Sullivan were charged with defrauding three insurance companies based on two traffic accidents. The indictment specifically alleged that eighteen separate mailings, from October 1977 to April 1980, were made in pursuit of a single scheme to defraud.[13] Whether the indictment actually alleged a single scheme is a critical point that we address below.

II. *THE PROCEEDINGS IN DISTRICT COURT*

Following the impanelling and swearing of the jury, counsel for Sullivan moved to dismiss several counts of the indictment against Sullivan on the grounds that they were based on conduct that bore no relationship to her. *See id.* at 21-22. The district court reserved judgment on the motion, and the government proceeded to make its opening statement to the jury. Based on the government's stated intention of proving its allegations by introducing transcripts of several sworn statements by Maker and Sullivan, the attorneys for each defendant requested severance so that each defendant could have an opportunity to cross-examine the other defendant about the substance of the sworn statements.[14] *See id.* at 154A (motion for severance as to Sullivan); *id.* at 155A (motion for severance as to Maker). The district court, persuaded that the question of joinder was at least troubling in light of this argument, *see id.* at 158-59A, decided to review the transcripts that the government intended to introduce at trial before deciding whether to grant a severance. *See id.* at 162A.

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13. At trial, the court dismissed two of these eighteen counts (specifically counts 4 and 6) at the request of the government. *Id.* at 68A.

14. Counsel for Sullivan also specifically objected that she would be substantially prejudiced by evidence admitted to prove the complicity of Maker. *See, e.g., id.* at 94-95A, 100A.

While arguing in favor of the motion to sever before the district court, Maker's counsel also requested that there be two trials for each defendant: one trial to consider each defendant's culpability regarding claims arising from the March 1976 accident and the other trial to consider each defendant's culpability regarding claims arising from the August 1977 accident. *See, e.g., id.* at 165A.[15] Although the district court initially responded to this request for severance by noting that the accidents might have been sufficiently related because the second accident had aggravated physical injuries caused by the first, *see id.* at 166-67A, the court nevertheless remained concerned about whether the accidents were, in fact, sufficiently related. *See id.* at 170A.

With these two motions before it, the district court reviewed several transcripts relating to Maker's civil proceedings[16] that the government intended to present at trial. Following this review, the court expressed great concern about the joinder for trial purposes of the defendants and of the accidents. *See id.* at 174A, 185-86A. Regarding joinder of the defendants, the court concluded that admitting the transcripts into evidence in a joint trial would preclude each defendant from having an opportunity to confront the other

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15. Maker's attorney had earlier argued in this regard that each of the accidents was independent of the other and that one indictment must not present a range of counts with some related to one and some to the other accident, just as one indictment could not rely on two unrelated bank robberies. *See id* at 122A.

16. These proceedings are described *supra* at pages 5-6. The transcripts were of the following: a deposition of Maker dated February 23, 1978; testimony of Maker dated March 26 and 27, 1979; a sworn statement of Maker dated August 9, 1977; and a sworn statement of Sullivan dated August 9, 1977.

about his or her statements. *See id.* at 180-82A. Regarding joinder of the accidents, the court came to two related and important conclusions, one legal and the other apparently factual. First, it decided that, to sustain a conviction for the alleged single scheme to defraud, the government was required to prove that the entire scheme had been planned in advance by the defendant, meaning that, in this case, the government had to prove that Maker had planned the second accident and had intentionally caused it. *See id.* at 190A, 191-92A ("it's impossible, just totally impossible for you to tell me that he planned to bilk Global [sic], Erie and State Farm back in 1976, before the two accidents happened").[17] The court then decided, based on its reading of the indictment and transcripts, that the government did not have evidence sufficient to prove this element of its case. *Id.* at 192A. Based on these conclusions, the district court granted the defendants' motion to sever the trial as to both the defendants and the accidents.[18] *Id.* at 283A.

The district court then ordered that the trial already under way proceed with only Maker continuing as a defendant and with only evidence and counts related to the April 1976 accident being considered. The government proceeded to call its first witness and following that testimony the trial was adjourned for the weekend. When the court reconvened on Monday, counsel for Maker brought to its attention this court's opinion in *United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982), which had established that a defendant

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17. The court restated this proposition somewhat later in the trial in these straightforward terms: "[The second accident] *would have to be contrived* in order to be a continuous scheme." *Id.* at 244A (emphasis added).

18. The district court therefore contemplated four separate trials. *See id.* at 282-83A.

cannot be tried for multiple schemes to defraud on an indictment charging a single scheme.[19] The district court reiterated its view that the government's allegations could not support a single scheme indictment. The court then ruled that, under *Camiel*, this defect in the indictment could not be cured by severing the trial as it originally had ordered. *See* Appendix at 642A.[20] The court thereupon dismissed

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19. In *Camiel*, we concluded that, when an indictment that alleges a single scheme is based as a legal matter on two or more separate schemes:

> it is the indictment itself that is fatally flawed.
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> Once this is recognized, the proper remedy is clear. We may identify the flaws in the current indictment but correcting those flaws is beyond our power. An indictment may not be amended, changed, or altered in any material respect except by resubmission to the grand jury. . . . This court can neither act for a grand jury, nor speculate whether a grand jury would have indicted the named defendants had it realized that the indictment as written was overbroad.

689 F.2d at 39 (citations omitted).

20. The court reasoned:

> It seems that as a single scheme indictment here, seems that the case is bottomed on a multiple scheme, at least two schemes. It appears from the [*Camiel*] case that this is a defect which cannot be cured by a severance, which I had attempted, and a separate trial. It says the indictment in [*Camiel*] is out because of the prejudicial variance, and an attempt by this Court, which the Court, in fact, did make, to cure this problem by severance . . ., especially when you have a situation where you have a single scheme theory with multiple schemes as a matter of fact alleged, under all these circumstances this Court has no other alternative except to dismiss this indictment . . . .

Id. at 262A.

the indictment on the motion of Maker, *id.*, but denied Maker's motion for a judgment of acquittal. *Id.* at 263A.

III. *APPELLATE JURISDICTION*

A.

We must first decide whether we have jurisdiction to consider this appeal. The Criminal Appeals Act, 18 U.S.C. § 3731 (1982), provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Supreme Court has concluded that this provision allows a government appeal of a district court order in a criminal case "unless the appeal is barred by the Constitution." *United States v. Wilson*, 420 U.S. 332, 339 (1975). *See generally id.* at 337-39.

Maker contends that there can be no appeal from the district court's order dismissing the indictment because the order represents a "factual" determination, based upon counsels' opening statements and a review of some of the government's intended evidence, that the government's evidence demonstrated two schemes rather than one. According to Maker, once jeopardy has attached, an appeal from such a "factual" conclusion is barred by the double jeopardy clause of the fifth amendment.[21] The

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21. The fifth amendment of the Constitution provides that "No person shall . . . be subject for the same offence to be twice put jeopardy of life or limb . . . ."

government responds that the district court dismissed the indictment as a result of an erroneous *legal* determination, and that the double jeopardy clause is, therefore, not implicated.[22]

The major policy underlying the double jeopardy clause was succinctly set out by Justice Black in *Green v. United States*, 355 U.S. 184, 187-88 (1957):[23]

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its

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22. During at least during one stage of the district court proceeding, the government, the defendants, and the district court all apparently believed that, because the jury had been impanelled, jeopardy had attached and the government would be precluded from further prosecutions of the defendants. *See, e.g.*, Appendix at 56A (statement by the U.S. Attorney that "[p]rejudice has attached by virtue of the jury having been impanelled, we would have no right of appeal of Your Honor's order at this point in time, so I have no choice but to comply with the Court's directions."); *id.* at 184A (Court suggests that defendants delayed their motion to dismiss until after the jury had been chosen so that a new proceeding would be barred by the double jeopardy clause). Although the Supreme Court has explicitly held that "[t]he federal rule that jeopardy attaches when the jury is empanelled and sworn is an integral part of the constitutional guarantee against double jeopardy," Crist v. Bretz, 437 U.S. 28, 38 (1975), this proposition, as we explain in the text *infra*, is the beginning rather than the end of our analysis.

23. One article has identified this passage as the Supreme Court's "most famous and oft quoted list of double jeopardy values." Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 86. As these authors point out, *id.*, the Supreme Court has also stated that the clause protects a defendant's "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949).

> resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The implications of this policy, however, are not without limit. Recently the Supreme Court has focused on a set of concerns that must inform the application of the double jeopardy clause. In *Burks v. United States*, 437 U.S. 1, 15 (1978), the Court stated that "society maintains a valid concern for insuring that the guilty are punished," and reiterated that "'[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.'" *Id.* (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964)).

In defining the impact of the double jeopardy clause on this case, we are guided primarily by the Supreme Court's decision in *United States v. Scott*, 437 U.S. 82 (1978). In *Scott*, the Court considered "the relationship between the Double Jeopardy Clause and reprosecution of a defendant who has successfully obtained not a mistrial but a termination of the trial in his favor before any determination of factual guilt or innocence." *Id.* at 94.[24] The Court, relying in substantial part on the theory that the defendant "suffers no injury cognizable under the Double Jeopardy Clause" when a proceeding is terminated as a

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24. The *Scott* case involved a government appeal of the dismissal of an indictment that was granted at the close of all the evidence because there had been preindictment delay.

result of the deliberate choice of the defendant,[25] concluded that "where the defendant . . . obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence" an appeal by the government is permitted. *Id.* at 100.

Thus, under *Scott* an appeal in this case is barred only if the issue of the defendants' guilt or innocence has been determined by the district court. *Scott* also provided the following test for deciding whether such a determination has been made: "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Id.* at 97 (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)) (brackets in original).[26]

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25. This principle, a species of the doctrine of waiver, has long been considered relevant by the Supreme Court in determining the application of the double jeopardy clause. *Compare* United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (requiring "manifest necessity" for a retrial if the defendant either did not move for or did not join in a motion for mistrial) *with* United States v. Dinitz, 424 U.S. 600, 611 (1976) (when the defendant consents to a mistrial, there is no constitutional bar to retrial unless there were "governmental actions intended to provoke mistrial requests"). *Cf.* United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion of Harlan, J.) ("where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error"). These cases are discussed by the Court in *Scott*. *See* 437 U.S. at 92-94, 98-100.

26. As the quoted language in *Scott* makes clear, the determination of whether there has been an acquittal does not turn on how the district court labels its decision. *See*

We believe that this language provides the crucial definition for determining whether double jeopardy bars an appeal when a proceeding is terminated on the motion of a defendant after the jury is sworn. *See, e.g., United States v. Genser*, 710 F.2d 1426, 1427-28 (10th Cir. 1983); *United States v. Dahlstrum*, 655 F.2d 971, 974 (9th Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *Hawk v. Berkemer*, 610 F.2d 445, 447 (6th Cir. 1979). The Court did not, however, provide significant direction on how the test should be applied, because in *Scott* the trial court clearly had not made a factual determination.[27] As we noted earlier, *see supra* note 24, the *Scott* case was dismissed because of preindictment delay, a determination that was independent of any finding related to the culpability of the defendant. Several courts of appeals have now had opportunities to apply the *Scott* test in more difficult contexts. While none has developed a bright-line formula, these courts have generally understood the test to require an acquittal only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element necessary for a criminal conviction. *See Carter v. Estelle*, 677 F.2d 427, 452-53 (5th Cir. 1982) (determination by the state

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also United States v. Ember, 726 F.2d 522, 524 (9th Cir. 1984) ("The trial judge's characterization of his own action cannot control the classification of the action."). Thus, our decision in this case would be the same regardless of whether the trial court had, on this record, effected his decision by granting Maker's motion for a judgment of acquittal.

27. One commentator has written that "*Scott* bars appeal of midtrial dismissals based on factual grounds but not those based on legal grounds. It provides little guidance, however, as to how this distinction should be drawn." Comment, *Double Jeopardy and Appeal of Dismissals: A Before and After Approach*, 69 Calif. L. Rev. 863, 876 (1981) (footnote omitted).

court of appeals of "an essential element of the offense charged" was an acquittal under Scott), *cert. denied*, 460 U.S. 1056 (1983); *United States v. Dahlstrum*, 655 F.2d 971, 974 (9th Cir. 1981) (although the court finds that the double jeopardy clause bars reprosecution because the defendant did not seek dismissal of the action, it also concludes that there is an acquittal under *Scott* only if "the district court's disposition *actually represented* a resolution of any of the factual elements of the offense charged" (emphasis in original)), *cert. denied*, 455 U.S. 928 (1982); *United States v. Moore*, 613 F.2d 1029, 1037 (D.C. Cir. 1979) (there is no acquittal under *Scott* "unless, in ruling on the applicability of the defense, the District Court somehow reached a resolution of one or more of the elements of the offense with which he is charged"), *cert. denied*, 446 U.S. 954 (1980); *Sedgwick v. Superior Court for the District of Columbia*, 584 F.2d 1044, 1049 (D.C. Cir. 1978) (*Scott* "does not bar government appeal and retrial unless [a dismissal] is premised on some *factual* determination of the insufficiency of evidence of defendant's guilt" (emphasis in original)), *cert. denied*, 439 U.S. 1075 (1979). *Cf. Wilkett v. United States*, 655 F.2d 1007, 1012 (10th Cir. 1981) (there was no acquittal under *Scott* when the trial was terminated because the government "failed to prove an element which is more procedural than substantive, namely, venue"), *cert. denied sub nom. Conklin v. United States*, 454 U.S. 1142 (1982).[28]

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28. In the wake of these cases, it remains unclear whether the *Scott* test for an acquittal requires that a determination by the district court made after significant testimony is heard be considered either a *per se* or a presumptive finding of fact. As the authors of one article suggest, determining whether a trial court's decision is fact-based or law-based becomes more difficult as a trial progresses, because any

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To determine whether *Scott* allows an appeal by the government in this case, we consider whether the district court resolved in Maker's favor "an essential element of the offense charged." *Carter*, 677 F.2d at 452-53. The district court dismissed the indictments because it concluded that the government had not alleged facts sufficient to prove all of the legal elements that it believed were necessary to sustain a conviction on a charge of a single scheme to defraud.[29] Specifically, the court concluded as a legal matter that a single scheme conviction requires proof that the defendant had planned the scheme in its major details before any aspect of the scheme is implemented. The court then made what is, at least arguably, a factual determination,[30] based on its reading of the civil proceeding transcripts, the indictment, and the

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decision by the court will be increasingly likely to be affected by its assessment of witnesses' credibility and its overall impression of the case. *See* Westen & Drubel, *supra* note 23, at 152-54. *See also* United States v. Ember, 726 F.2d 522, 524 & n.4 (9th Cir. 1984) (finding that the district court had resolved "factual elements" because it "commented that the government had a weak case, had presented it poorly, and had done a poor job of preserving the evidence"). Because the district court in this case made its determination based only on the government's opening statement and the court's review of certain transcripts, and appears otherwise to be based essentially on legal grounds, we need not resolve this issue.

29. The district court's analysis in this regard is set out in detail *supra* at note 17 and accompanying text.

30. Because we conclude that any factual determination made by the district court in this case did not resolve an essential element of the offense, we need not decide whether that determination was itself legal in character because it was based merely on the district court's assessment of *allegata*, rather than on an assessment of *probata*.

opening statements, that the government could not prove that Maker had intentionally planned and then caused the second accident.[31]

The government's appeal in this case is barred only if the district court's legal determination about the elements of a single scheme conviction is correct. We are, however, unable to find in the cases any requirement that a conviction for a single scheme to defraud must rest on a showing that the entire scheme was planned at the outset or, to state the requirement in other words, that the scope of a mail-fraud scheme is determined by the defendant's state of mind at the time of the initial alleged incident of mail fraud. We are also unwilling to establish such a requirement, because it would unnecessarily distract a court from the factors that we believe are fundamental to a determination of whether a scheme is ongoing and unified. As we explain further in section IV, these factors include the identity of the defendants and the similarities in the allegedly fraudulent conduct. Therefore, the district court's arguable factual finding did not actually determine in Maker's favor any of the essential elements of the crime with which he was charged.

We do not mean to suggest, of course, that, if the government were able to prove that Maker either planned or intentionally caused the second accident, such evidence would be irrelevant to the issue of whether a single scheme existed. Such evidence might, in fact, be *sufficient* to prove the existence of a single scheme, but such evidence is in no way *necessary* to secure a conviction. Thus, this case is not unlike *United States v. Moore*, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980). In *Moore*, the court allowed the government's appeal despite the fact

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31. These determinations are also outlined *supra* at pages 11-13 in our discussion of the district court proceedings.

that, in dismissing the case, the district court determined facts that were relevant to, but not decisive of, one element of the crime.[32] The district court's

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32. In United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980), the court considered whether the government could appeal an order dismissing an indictment after an "evidentiary-type proceeding" in a bench trial. *Id.* at 1033. Moore had been charged with knowingly making false declarations before a grand jury in violation of 18 U.S.C. § 1623(a). A conviction for false declarations requires that the individual "in any proceeding before [a] . . . grand jury . . . knowingly make[] any false material declaration." 18 U.S.C. § 1623(a) (1982), and Moore had conceded that he had knowingly made the false statements. 613 F.2d at 1037. Thus, the sole issue at the bench trial was whether his declarations were material. *See id.* at 1034-35. The court had before it the testimony of the deputy foreman of the grand jury, "whose testimony went exclusively to the issue of materiality." *Id.* at 1033.

The district court found that Moore's false statements had not had a substantial effect on the grand jury proceeding, and accordingly the court dismissed the indictment holding that "[Moore] must be afforded the opportunity to recant his prior statement," *id.* at 1037, by availing himself of the recantation defense established by 18 U.S.C. § 1623(d). Moore, in fact, had offered before the trial to appear before the grand jury and recant his statement, but the government rejected that offer because it did not deem the new facts to be credible. *See id.* at 1032-33.

In deciding whether the appeal was barred under *Scott*, the court of appeals, determined that, as a legal matter, "a finding of no substantial effect [for purposes of applying the recantation provision] is not the equivalent of a ruling for the defendant on the issue of materiality [for purposes of the substantive offense]." 613 F.2d at 1038-39. Thus, despite the fact that the district court had made a factual determination as to the effect of Moore's false statement on the grand jury proceeding, the court of appeals held that *Scott* did not bar the government's appeal. In reaching this decision the court concluded, as a matter of law, that:

dismissal of the indictment is therefore not an acquittal under the teaching of *Scott*, and the government's appeal of the dismissal is not barred.

Our conclusion that an appeal is not barred in this case is consistent with the policies underlying the double jeopardy clause. This is not a case in which a second trial is permitted "for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11 (1978). Instead, this is a case in which the district court, as the result of a legal error, determined that the government could not prove a fact that is not necessary to support a conviction. To preclude an appeal in this case would deprive the public "of its valued right to 'one complete opportunity to convict those who have violated its laws.'" *Scott*, 437 U.S. at 100 (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1975)).

IV. *THE SUFFICIENCY OF THE INDICTMENT*

Having concluded that the double jeopardy clause does not bar the government's appeal in this case, we consider whether the district court erred when it dismissed the indictment against Maker and Sullivan because of a prejudicial variance. Such a dismissal is necessary when (1) there is a variance between the indictment and the proof and (2) the variance, if any,

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> false testimony that has not had a substantial effect for purposes of [the applicability of the recantation defense] may still be material in the Section 1623(a) sense. Consequently, the District Court's ruling that Moore's false statements did not have a substantial effect on the grand jury proceeding did not resolve in his favor any of the factual elements of the offense of false declarations.

Id. at 1038 (footnote omitted). Our approach in this case is similar.

prejudices some substantial right of the defendant. *See United States v. Camiel*, 689 F.2d 31, 35 (3d Cir. 1982).[33]

Our initial inquiry into whether variance exists is intended to protect the right of each defendant not to be tried for the conglomeration of distinct and separate offenses. *See Kotteakos v. United States*, 328 U.S. 750, 775 (1946). In *Camiel*, we considered in detail whether, on the evidence presented by the government, there had been one single scheme to defraud, or more than one independent scheme. We established, first, the general proposition that "the federal mail fraud statute requires only that the co-schemers participate in a common scheme. Thus, it is the existence of a common scheme, and not any agreement among the parties to participate in it, that is critical." *Camiel*, 689 F.2d at 36. Because of the specific facts of the case, however, we focused primarily on the factors that *militated against* finding a common scheme. We decided that a conclusion that a common scheme existed was substantially undermined because two individuals, who were actively hostile to each other, had acted in the organizational capacity that was considered the "key" to the alleged scheme. *Id.*[34] We also searched in vain for evidence "that could link the relevant activities into a common scheme." *Id.* Despite the government's claim that the disparate activities were "weld[ed]" into a common scheme because one

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33. In *Camiel*, the government appealed a judgment of acquittal that the district court entered following a jury verdict of guilty. *See* 689 F.2d at 34-35. We concluded that because the defendants had been prejudiced by the variance between the indictment and proof the district court had acted properly when it entered its judgment of acquittal.

34. The "key-person" in the scheme was the chairman of a city political committee. 689 F.2d at 36.

organization (i.e., the City Committee) had employed the two "key" figures in the same position, we considered this link legally insufficient to make out a common scheme because the unlawful conduct was not intended to further the Committee's institutional purposes. *Id.* Accordingly, we affirmed the district court's judgment of acquittal. *Camiel*, therefore, teaches that in evaluating whether one scheme has been alleged or proved, a court should focus on the identity of the actors and the overall purpose of their conduct.

More recently, in *United States v. DiPasquale*, 740 F.2d 1282 (3d Cir. 1984), we considered whether an indictment that alleged a single conspiracy was actually based on at least two separate conspiracies.[35] We concluded that "evidence [of the similarity of method and result, and the partial overlap of participants, in the various incidents] is probative of a unitary conspiracy." *Id.* at 1290.[36] These elements of a single scheme are wholly consistent with those identified by the Fifth Circuit in *United States v. Rodgers*, 624 F.2d 1303 (5th Cir. 1980), *cert. denied sub nom. Anthony J. Bertucci Construction Co. v. United States*, 450 U.S. 917 (1981). In *Rodgers*, the court concluded that a single scheme was proved when the evidence showed "a common goal, operations carried out in virtually identical manner, and an overlapping of participants. . . . The presence of these

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35. *Camiel* had established that the factors that determine whether a single conspiracy is present are identical to those that determine whether a single scheme is present. *See id.* at 35.

36. In *DiPasquale* we also noted that a single scheme is indicated when the activities "demonstrate[] 'a continuity of purpose and a continued performance of acts.'" 740 F.2d at 1290 (quoting United States v. Mayes, 512 F.2d 637, 642 (6th Cir.), *cert. denied*, 422 U.S. 1008, 423 U.S. 840 (1975)).

factors is more than sufficient to refute defendants' argument of a prejudicial variance." *Id.* at 1307 (citation omitted).

With these factors in mind,[37] we turn to the allegations presented by the government in this case. We consider first "the similarity of [both] method and result" in regard to the alleged scheme. *DiPasquale*, 740 F.2d at 1290. The government alleges that the co-defendants intended to defraud three insurance companies by misrepresenting the nature of the damages caused by two automobile accidents.[38] We discern in the allegations several important similarities in how the co-defendants sought to realize their intentions. First, the government alleges that Maker made the same fraudulent representation about his employment history just prior to the accidents to each of the three insurance companies in his attempt to secure wage-loss benefits. *See supra* note 8 and accompanying text. The government also alleges that Maker was employed as a boilermaker for three periods of time during which one could conclude that he received wage-loss benefits from either two or three of the insurance companies based on fraudulent claims. Finally, the government alleges that Maker used more

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37. We emphasize that the *Camiel*, *DiPasquale*, and *Rogers* decisions did not suggest in any way that a single scheme could be proved only when the government demonstrated that the participants had planned all of the allegedly fraudulent activities from the outset.

38. Certainly the fact that more than one insurance company was allegedly victimized does not undercut the existence of single scheme to defraud, when the method and result of the victimization were the same. *See, e.g.*, United States v. Lebovitz, 669 F.2d 894, 897-99 (3d Cir.) (mailings sent to two different insurance companies were sufficiently related to support a conviction for a single scheme to defraud), *cert. denied*, 456 U.S. 929 (1982).

than one false name and social security number in connection with these jobs, apparently to conceal his employment from the three allegedly defrauded companies.[39] We believe that these three allegations, when considered together, are sufficient indicia of the common purpose and method that are elements of a single scheme to defraud.

The third factor discussed in *Camiel*, *DiPasquale*, and *Rodgers* is the overlap of participants. In this case, the government alleges that the same two defendants were involved in all aspects of the scheme. Although Sullivan's involvement was apparently small in comparison to Maker's, if the government is able to prove its allegation that she aided and abetted Maker in pursuit of the scheme, *see, e.g.*, Appendix at 74A, her lack of participation in all aspects of the scheme does not necessarily establish her lack of culpability as to the entire scheme.[40] Thus, this case does not raise the concerns we had in *Camiel*, where the government's alleged single scheme involved two different, antagonistic schemers over two different time periods. Our concern in *Camiel* -- that one group of defendants would be prejudiced by the introduction of evidence of incidents that took place when a completely different group of individuals was allegedly pursuing the same scheme -- simply is not implicated in this case.

The fact that the second accident in the present case was neither planned nor intended from the outset does not alter our analysis of whether one or multiple schemes are involved. We conclude that, because the

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39. *Cf.* United States v. Pearlstein, 576 F.2d 531, 535 (3d Cir. 1978) (use of aliases is itself circumstantial evidence of conscious deception).

40. As we discuss below, severance of the trials is the proper method of preventing Sullivan, whose involvement in the scheme was relatively minor, from being prejudiced by having all of the evidence against Maker introduced against her.

fraudulent conduct and purpose are consistent in regard to claims arising from the different accidents, and the identities of the participants are identical, the government has properly alleged one scheme to defraud. Because each of the three elements of a single scheme to defraud are stated by the government's allegations against Maker and Sullivan, there is no variance in this case. Accordingly the district court erred in dismissing the indictment as one based on more than one independent scheme to defraud.[41]

V. *SEVERANCE OF THE TRIALS*

Maker argues that we have no jurisdiction to decide the questions relating to the severance of the charges and of the defendants, since the notice of appeal referred only to the order dismissing the indictment. See Brief for Appellee Robert James Maker at 12-14. As the following discussion will demonstrate, the issues raised by the district court's decision to sever the trial are intertwined with those raised by the dismissal of the indictment; therefore, we deem those questions to be properly raised by the notice of appeal.

The district court's decisions to sever the trial of the counts stemmed from its conclusion that the indictment charged two schemes rather than one. *See supra* pages 11-13. As we have explained, this conclusion was in error. The government has indicted the defendants for a single scheme to defraud, and it is entitled, absent some cause, to a single trial in which to demonstrate that the single scheme existed and that all of the counts were related to that single scheme. *See* Fed. R. Crim. P. 8(a); *Breeland v. United States*, 396

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41. Because we conclude that there was no variance, we need not consider whether some substantial right of the defendants was prejudiced by its existence. *See* United States v. Fischbach and Moore, Inc., No. 84-3242, slip op. at 11 (3d Cir. Dec. 10, 1984).

F.2d 805 (5th Cir.), *cert. denied*, 393 U.S. 847 (1968). Given our rejection of the district court's conclusion that the indictment was based on two schemes rather than one, and in the absence of any other "cause" for severing the trials on the different counts, we conclude that the district court abused its discretion in ordering severance.

The government next contends that the district court erred when it severed the trial as to the codefendants. Specifically, the government argues that the district court committed legal error in concluding that in a separate trial Sullivan would have been able to cross-examine Maker about statements made by him in the course of the earlier civil proceedings. The government contends that Maker could properly invoke the privilege against self-incrimination in a subsequent trial involving Sullivan, even if Maker had already been convicted. Additionally, the government contends that, because the statements by Maker would not be introduced during Sullivan's trial to prove the truth of his assertions, the statements would not be hearsay; therefore, Maker's availability for cross-examination should not have been relevant to a determination of whether Sullivan should be granted a separate trial. We do not resolve these issues because we conclude that the district court acted well within its discretion in deciding to sever the trial of the defendants. *See United States v. Reicherter*, 647 F.2d 397, 400 (3d Cir. 1981).

Sullivan's involvement in the alleged scheme was limited. She made a statement in support of Maker's claim against Royal Globe for household services for the period between April 1976 and August 1977, *see* Appendix at 267A, 298A, and she allowed her tax return for 1976 to be submitted to Royal Globe in support of that claim. *See id.* at 301A. Maker allegedly worked as a boilermaker for the last four months of

that period, under a different name, *see supra* pages 7-8, and Sullivan stated that she lived in his apartment during that period. *See* Appendix at 277-78A, 298A. There is nothing in the indictment, however, that indicates that Sullivan participated in the subsequent incidents involving the claims against State Farm and Erie, which constitute the bulk of the allegedly fraudulent claims, and evidence that Maker worked and continued to receive benefits during the period after August 1977 is only tangentially relevant to the question whether Sullivan fraudulently testified that Maker was incapacitated before August 1977. It is at least likely that much of the evidence against Maker would not be admissible against Sullivan, and that prejudice could result from the jury hearing that evidence. Under these circumstances, we conclude that the district court did not abuse its discretion when it severed the trials of the defendants. *See Bernitsky v. United States*, 620 F.2d 948, 950 (3d Cir.) ("[W]e are free to affirm the district court on any basis which finds support in the record."), *cert. denied*, 449 U.S. 870 (1980).

We do not hold that a decision to try the defendants together would be an abuse of discretion, only that the severance decision was within the court's discretion. Accordingly, the prosecution may, if it chooses, raise this issue again before the district court.

VI. *CONCLUSION*

In sum, we conclude that (1) this appeal is not barred by the double jeopardy clause of the fifth amendment; (2) the district court erred in dismissing the indictment, because a conviction based on a single scheme indictment could be supported by the facts the government intended to prove during the trial; (3) the district court's decision to sever the trial as to the counts arising from the separate accidents constituted

an abuse of discretion because it was based on the court's erroneous conclusion that the indictment actually alleged two separate schemes to defraud; and (4) the court did not abuse its discretion in ordering separate trials for each defendant.

The judgment of the district court will be reversed, and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES CONSTITUTION,
AMENDMENT V, CLAUSE 2:

"No person shall be. . .subject for the same offense to be twice put in jeopardy of life or limb. . ."

Office - Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1419

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT JAMES MAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTIONS PRESENTED

1. Whether the dismissal of a mail fraud indictment, based on the erroneous legal conclusion that an indictment charging a single fraudulent scheme must allege that the entire scheme was planned in advance, constituted an acquittal immune from appeal under the Double Jeopardy Clause.

2. Whether the indictment correctly charged a single fraudulent scheme.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 751 F.2d 614.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1984. The petition for a writ of certiorari was filed on February 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 30, 1982, petitioner and co-defendant Constance Sullivan were indicted in the Western

District of Pennsylvania on 18 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2, in connection with a scheme to defraud three insurance companies. The district court dismissed the indictment. The court of appeals reversed and reinstated the indictment (Pet. App. 1a-30a).

The indictment charged that petitioner and Sullivan filed false claims arising out of two automobile accidents in which petitioner was involved in March 1976 and in August 1977. Specifically, the indictment charged that petitioner received $95,000 to compensate him for lost wages by misrepresenting his employment history and falsely stating that he was unable to work after the accidents. The indictment further charged that petitioner used an alias and false social security numbers to conceal from the insurance companies the fact that he worked as a boilermaker during periods for which he claimed wage-loss benefits. Pet. App. 3a-9a.

2. The proceedings in the district court are detailed in the opinion of the court of appeals (Pet. App. 9a-13a). After the jury was sworn, co-defendant Sullivan moved to dismiss several counts that she claimed related only to petitioner. The district court reserved its ruling, and the prosecutor made his opening argument. Thereupon, the defendants requested severance so that they could cross-examine each other about certain prior statements that the prosecutor intended to introduce into evidence. Petitioner also argued that there should be two trials for each defendant because the charges relating to the 1976 accident had to be tried separately from the charges relating to the later accident. *Id.* at 9a-10a.

After reviewing transcripts of civil proceedings involving petitioner's insurance claims, the district

court granted the motion to sever the trial both as to defendants and as to the accidents. The court concluded that there were separate schemes arising out of each accident and hence that separate trials were required. The court explained that a single scheme to defraud could not be found unless the government could prove that the defendants had planned the entire scheme, notably the second accident, in advance. Based on its reading of the civil transcripts and the indictment, the court found that the government could not meet that burden because it would not show that the second accident was planned. Pet. App. 10a-11a.

The trial then proceeded with only petitioner as defendant and only on the counts relating to the 1976 accident. After a single witness testified, petitioner moved for dismissal of the indictment on the authority of *United States* v. *Camiel*, 689 F.2d 31 (3d Cir. 1982), which held that a defendant cannot be tried for multiple schemes to defraud on an indictment charging a single scheme. The district court dismissed the indictment, finding that this defect in the indictment could not be cured by severance. The court, however, denied petitioner's motion for a judgment of acquittal. The government appealed the dismissal of the indictment, the severance of the counts relating to the separate accidents, and the severance of the defendants. Pet. App. 11a-13a.

3. The court of appeals reversed and reinstated the indictment (Pet. App. 1a-30a). The court rejected petitioner's contention that the Double Jeopardy Clause barred appeal of the dismissal of the indictment. The court explained that, under *United States* v. *Scott*, 437 U.S. 82, 97 (1978), an appeal would be barred only if the dismissal were tanta-

mount to an acquittal, that is, if " 'the ruling of the judge, whatever its label, actually represent[ed] a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' " The court held that there was no "requirement that a conviction for a single scheme to defraud must rest on a showing that the entire scheme was planned at the outset" (Pet. App. 20a). Accordingly, the court concluded that the district court did not make a factual resolution of any element of the charged offense, and hence its order was not an acquittal. *Id.* at 13a-22a.

On the merits, the court of appeals held that the district court erred in dismissing the indictment (Pet. App. 22a-27a). The court concluded that the indictment's allegations of a common purpose and method with respect to the two accidents supported a charge of a single fraudulent scheme. Therefore, the indictment should not have been dismissed. Given this conclusion, the court of appeals also held that the district court abused its discretion in ordering separate trials with respect to the two accidents (*id.* at 27a-28a).[1]

ARGUMENT

1. Petitioner contends (Pet. 17-22) that the court of appeals lacked jurisdiction to hear this appeal because a retrial would be barred by the Double Jeopardy Clause. This contention is without merit.

Petitioner relies on the statement in *Arizona* v. *Rumsey*, No. 83-226 (May 29, 1984), slip op. 8, that "an acquittal on the merits bars retrial even if based

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[1] The court upheld, however, the district court's decision to hold separate trials for the two defendants as within the allowable limits of its discretion (Pet. App. 28a-29a).

on legal error." [2] This approach simply begs the question. The court of appeals did not take issue with this statement; it did not even discuss the treatment of acquittals. Its decision rested on the conclusion that the district court's action was merely a dismissal of the indictment and not an acquittal, so that retrial is permitted under *United States* v. *Scott*, 437 U.S. 82 (1978). Petitioner advances no reason why this analysis was erroneous and, particularly, does not suggest how the court erred in concluding that this was a dismissal.

In fact, there can be little doubt that the court of appeals correctly concluded that the district court's action here was a dismissal of the indictment, not an acquittal. While not in itself determinative, the court's labelling of its action as a dismissal and its accompanying denial of petitioner's motion for a judgment of acquittal plainly indicate the district court's perception of what it was doing. There was no factual resolution of any element of the crime charged.[3] Nothing in the district court's rulings even remotely suggests a finding that the government had failed or would fail to establish that each of the charged mailings was made in furtherance of a scheme to defraud the insurers. Indeed, there were

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[2] Petitioner's intimation that this principle originated in *Rumsey*, and hence might not have been considered by the court of appeals, is quite mistaken. The Court's discussion in *Rumsey* makes clear that the statement was intended only to summarize earlier opinions, and, indeed, much of the discussion is a direct quotation from *United States* v. *Scott*, 437 U.S. 82, 98 (1978), on which the court of appeals relied.

[3] As the court of appeals held, the district court dismissed the indictment because it believed—erroneously—that there was a legal defect in charging a single scheme. See pages 5-6, *infra*.

no facts adduced in the very brief portion of the trial that occurred that played any role in the district court's decision. The defect found by the court was in the indictment itself, not the proof, and the district court's ruling could as readily have been made before as after the attachment of jeopardy. Under *Scott*, therefore, the fact that petitioner did not raise his objection until after jeopardy had attached does not entitle him to the windfall of escaping trial altogether.

2. Petitioner also contends (Pet. 23-26) that the court of appeals erred in finding that the allegations of the complaint could establish a single fraudulent scheme. There is no reason for this Court to review this completely fact-bound claim, especially at this interlocutory stage. Petitioner will be free to raise this claim again if he is convicted, at which time it could be considered in light of the evidence adduced at trial. In any event, the claim is without merit.

Single schemes to defraud are often "multi-faceted." *United States* v. *Zeidman*, 540 F.2d 314, 318 (7th Cir. 1976). As petitioner acknowledges (Pet. 24), "a common goal, operations carried out in virtually identical manner, and an overlapping of participants" are factors probative of a single scheme. *United States* v. *Rodgers*, 624 F.2d 1303, 1307 (5th Cir. 1980), cert. denied, 450 U.S. 917 (1981). Thus, the fact that there is a significant chronological distance between different incidents central to the scheme does not mean that more than a single scheme is involved. *United States* v. *DiPasquale*, 740 F.2d 1282, 1290 (3d Cir. 1984) (distinct extortion incidents involving different victims); see also *United States* v. *Robinson*, 716 F.2d 1095, 1096 (6th Cir. 1983), cert. denied, No. 83-5612 (Jan. 9,

1984), cert. granted, No. 83-613 (Mar. 4, 1985) (insurance fraud based on inflated claims arising out of more than one fire).

As the court of appeals explained (Pet. App. 25a-27a), application of these factors here suggests that the charged fraud was a single scheme. There was a single objective—obtaining wage-loss and related benefits for damages petitioner purportedly suffered as a result of the two automobile accidents. Moreover, petitioner obtained the benefits in each case by making "the same fraudulent representation about his employment history just prior to the accidents," and by "conceal[ing] his employment [during periods for which he claimed disability] from the three allegedly defrauded companies" (*id.* at 25a-26a (footnote omitted)). Finally, the indictment "alleges that the same two defendants were involved in all aspects of the scheme" (*id.* at 26a).

At any rate, even if the finder of fact were to conclude that the evidence at trial established two schemes, rather than one, such a variance would surely be immaterial in this prosecution of 18 substantive mail fraud counts. It simply makes no practical difference whether the indictment charges one or two fraudulent schemes. The question for the jury (for which petitioner must prepare his defense) is the same—whether each mailing charged in the indictment was made in furtherance of a fraudulent scheme. See generally *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), slip op. 4-5. If a particular mailing was so made, then petitioner is guilty of mail fraud regardless of whether the particular scheme encompassed both accidents or was restricted to one. And charging the fraud as two separate schemes would not prevent the trial of all 18 counts together

because the offenses clearly could be joined in one indictment under Fed. R. Crim. P. 8(a) as offenses "of the same or similar character."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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